STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS ACCEPTANCE CORPORATION, Plaintiff-Appellee, v TITAN INSURANCE COMPANY, Defendant-Appellant, and JOHN TOWNER, Defendant.	UNPUBLISHED October 7, 2004 No. 244722 Genesee Circuit Court LC No. 01-070236-PD

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant Titan Insurance Company (Titan) appeals as of right from the circuit court's order granting plaintiff's motion for summary disposition under MCR 2.116(C)(10). This case arises out of plaintiff General Motor Acceptance Corporation's (GMAC) claim for repossession or payment for a vehicle owned by defendant John Towner and GMAC's subsequent claim as lienholder on the vehicle for insurance proceeds from Titan after the vehicle was stolen and destroyed. We vacate the trial court's order, and remand for further proceedings consistent with this opinion.

A. Facts[1]

On November 16, 2000, Towner purchased a new Buick Park Avenue from Patsy Lou Williamston Buick-GMC, Inc. The sales contract was later assigned to GMAC. On March 15, 2001, Towner's driver's license was apparently suspended after a default judgment was entered against him for failure to appear for a speeding ticket. On March 26, 2001, Towner applied for insurance coverage on the Buick with Titan.

On April 24, 2001, GMAC filed a complaint against Towner alleging that he had defaulted under the terms of the sales contract by failing to make his payments. GMAC sought repossession of the vehicle, or in the alternative, a judgment in the amount of the balance owed. On April 30, 2001, the Buick was stolen from Towner; it was eventually recovered, but it had been destroyed.

On May 4, 2001, after receiving notice of the claimed loss, Titan notified Towner and GMAC that it was rescinding the policy because Towner's insurance application contained a material misrepresentation. Specifically, when asked, "Does the applicant or any member of the applicant's household have a suspended or revoked driver's license," Towner checked "No." Titan issued a check to Towner refunding his insurance premiums paid to date.

GMAC's complaint was then amended by stipulation to add Titan as a defendant. In the amended complaint, GMAC alleged that after the Buick was stolen and destroyed, it made a valid claim with Titan as a lienholder under the policy covering the Buick. The claim was denied; thus, in the amended complaint, GMAC sought payment of the value of the vehicle at the time of the loss.

GMAC moved for summary disposition under MCR 2.116(C)(10), arguing that it had a valid lien against the Buick, and Titan's attempt to void the policy ab initio was ineffective because GMAC was an innocent third party. In response, Titan filed a cross-motion for summary disposition under MCR 2.116(C)(10), arguing that Towner's insurance application was validly rescinded based on his material misrepresentation. Furthermore, Titan argued that GMAC was not an innocent third party because the "innocent third party doctrine" only applied to insurance claims made under mandatory insurance plans – personal injury protection and residual bodily injury liability coverage – pursuant to the no-fault insurance act, MCL 500.3101 *et seq*, but the claimed loss was recoverable under Towner's *optional* collision coverage.

After hearing oral arguments on the motions, the trial court held that under *Lake States Ins Co v Wilson*, 231 Mich App 327; 586 NW2d 113 (1998), Titan was required to verify the status of Towner's license because that information was easily ascertainable. Accordingly, the court granted GMAC's motion for summary disposition, denied Titan's cross-motion for

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[1] As will be seen later in this opinion, several of the material facts are asserted by defendant, but were not supported by admissible evidence before the trial court. We deal with these deficiencies in the Analysis section of this opinion.

summary disposition, and ordered Titan to provide insurance coverage for the Buick. After denying Titan's motion for reconsideration, the trial court entered an amended judgment in favor of GMAC, from which Titan now appeals.

B. Analysis

This Court reviews de novo a trial court's ruling on a motion for summary disposition brought under MCR 2.116(C)(10). *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the assertion that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). The purpose of the motion is to test the factual support for a claim. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 657; 651 NW2d 458 (2002). Because the purpose of such a motion is to test the factual support for the claim(s), the moving party has the initial burden of coming forward with substantively admissible evidence supporting the position taken in the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). When reviewing the motion, the court must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Universal Underwriters*, *supra* at 720. Here, however, the trial court was presented with cross-motions for summary disposition, with both parties asserting that the undisputed facts required judgment be entered in their favor.

Before we address the factual basis for the parties' assertions, we first turn to the legal doctrines that control the issues raised in plaintiff's amended complaint.

MCL 500.2103(1) states, in relevant part:

> "Eligible person", for automobile insurance, means a person who is an owner or registrant of an automobile registered or to be registered in this state or who holds a valid Michigan license to operate a motor vehicle, but does not include any of the following:
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> * * *
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> (b) A person whose license to operate a vehicle is under suspension or revocation.

According to Titan, because Towner's license was allegedly suspended when he applied for insurance coverage, he was ineligible to receive insurance coverage, and he therefore made a material misrepresentation by indicating in his application that his license was not suspended. As a result, according to Titan, it was entitled to rescind the policy after discovery of the misrepresentation.

In *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568, 569-570; 242 NW2d 530 (1976), the defendant applied for no-fault insurance in February or March 1971, and indicated on the application that his license had not been suspended or revoked within the preceding five years. In fact, the defendant's license had been suspended for one month the year

before. *Id*. at 570. On May 20, 1971, the defendant was involved in a car accident that killed one man and left five other people injured. *Id*. In August 1971, State Farm notified the defendant that his policy had been rescinded retroactive to May 10, 1971, based on the material misrepresentation in his application. *Id*. The family of the deceased man brought suit against the defendant, and State Farm brought an action seeking declaratory relief regarding the validity of the policy. *Id*. The trial court held the policy was in effect on May 20, 1971. *Id*. at 570-571.

On appeal, this Court addressed whether State Farm had "reasonably relied on the representations of the insured so as to justify a holding that the policy was procured by fraud, thus warranting a judicial determination that the policy was void *ab initio*." *Id*. at 574. This Court first noted that State Farm could have easily obtained a copy of the insured's driving record, and then agreed with the trial court that misrepresentations of the insured should not prevent recovery against the insurer by third parties who had been injured by the insured. *Id*. at 578. Thus, this Court held that "where an automobile liability insurer retains premiums, notwithstanding grounds for cancellation reasonably discoverable by the insurer within the 55-day statutory period as prescribed by [MCL 500.3220], the insurer will be estopped to assert that ground for rescission thereafter." *Id.* at 579.

The next case to address a similar issue was *United Security Ins Co v Comm'r of Ins*, 133 Mich App 38, 45; 348 NW2d 34 (1984). However, the facts of *United Security* differed from *State Farm*: in *State Farm* innocent third parties were injured and killed, but in *United Security* only the applicant was injured in an accident that occurred one hour after he filled out his application that contained a material misrepresentation. *Id*. at 40, 43; *State Farm*, *supra* at 570. This Court noted that the policy behind Michigan's no-fault automobile insurance system was to require that the insurer, rather than innocent third parties, bear the risk of intentional material misrepresentations by the insured. *Id*. at 43. However, we concluded that there was no reason to place that same burden of risk on the insurer in preference to the insured who intentionally made the material misrepresentations. *Id*. Although in *State Farm*, the Court placed a duty on an insurer to make a reasonable investigation of insurability within a reasonable time after issuing a policy, the insurer owed no duty *to the insured* to discover the latter's intentional material misrepresentations. *Id*. at 45.

This Court addressed the misrepresentation issue later that same year in *Cunningham v Citizens Ins Co of America*, 133 Mich App 471; 350 NW2d 283 (1984). In *Cunningham*, the plaintiff intentionally falsified his application. Citizens began its routine investigation into the plaintiff's driving record, but one month later the plaintiff was injured in an accident; the next day Citizens discovered the misrepresentation. *Id*. at 476. Citizens then notified the plaintiff that it was rescinding the policy and returned his premiums; it also refused to pay the plaintiff any benefits for the accident. *Id*. at 476-477. The trial court granted plaintiff summary disposition. *Id*.

On appeal, this Court acknowledged that, under *State Farm*, if innocent parties had been injured, it would compel a finding that coverage existed, at least for the third parties. *Id*. at 477. We then held that where an intentional material misrepresentation is made in an application for no-fault insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy through fraud, the insurer is entitled to rescind the policy and declare it void ab initio. *Id*.; see also *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997).

The holdings of *United Security* and *Cunningham* have been repeatedly confirmed. *Coburn v Fox*, 425 Mich 300, 310 n 3; 389 NW2d 424 (1986); *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170-171; 505 NW2d 895 (1993); *Ohio Farmers Ins Co v Michigan Mut Ins Co*, 179 Mich App 355, 364-365; 445 NW2d 228 (1989); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985); *Auto-Owners Ins Co v Comm'r of Ins*, 141 Mich App 776; 369 NW2d 896 (1985). And this Court later clarified that the *Cunningham* Court "specifically disavowed [*State Farm*] to the effect that a policy of no-fault insurance becomes absolute once an injury arises," and the *United Security* Court rejected that proposition to the extent that "the cases in which it had previously been endorsed involved innocent third-party claimants." *Auto-Owners*, *supra* at 780.

In 1994, this Court again noted that a material misrepresentation generally entitled the insurer to retroactively rescind a policy, but that right ceased to exist once a claim arose involving a third party. *Farmers Ins Exch v Anderson*, 206 Mich App 214, 218; 520 NW2d 686 (1994). This Court pointed out, however, that the prior cases did not address two relevant statutory provisions: MCL 257.520(f)(1)[2] and MCL 257.520(g).[3] *Id*. at 217-218, 220. Under MCL 257.520(f)(1), even if an application contains a material misrepresentation and an innocent party is later injured, the insurer's liability should be limited to the statutorily mandated

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[2] MCL 257.520(f) states:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
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> (1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy, and except as hereinafter provided, no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy, or in adjusting a claim under such policy, and no failure of the insured to give any notice, forward any paper or otherwise cooperate with the insurance carrier, shall constitute a defense as against such judgment creditor.

[3] MCL 257.520(g) states:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

minimum coverage. *Id*. at 218. Further, reading the two provisions together led this Court to the conclusion "that the Legislature did not intend to preclude an insurer from using fraud as a defense to void optional insurance coverage." *Id*. at 219. Thus, notwithstanding the prior general rule regarding policies rescindable for misrepresentation, this Court declined to

> go so far as to say that a validly imposed defense of fraud will absolutely void any optional excess insurance coverage in all cases. To the contrary, when fraud is used as a defense in situations such as these, *the critical issue necessarily becomes whether the fraud could have been ascertained easily by the insurer at the time the contract of insurance was entered into*. We think it unwise to permit an insurer to deny coverage on the basis of fraud after it has collected premiums, when it easily could have ascertained the fraud at the time the contract was formed . . . . [*Id*. at 219 (emphasis added).]

This Court later reiterated this new addition to the preceding holdings in *Lake States*, *supra* at 331:

> It is the well-settled law of this state that where an insured makes a material misrepresentation in the application for insurance, including no-fault insurance, the insurer is entitled to rescind the policy and declare it void ab initio.
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> * * *
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> Nevertheless, there is an exception to this general rule. Once an innocent third party is injured in an accident in which coverage was in effect with respect to the relevant vehicle, the insurer is estopped from asserting fraud to rescind the insurance contract. MCL 257.520(f)(1). . . .

This Court went on to explain, however, that "an insurer is not precluded from rescinding the policy to void any 'optional' insurance coverage, MCL 257.520(g) . . . unless the fraud or misrepresentation could have been 'ascertained easily' by the insurer." *Id.* at 331-332, quoting *Farmers Ins Exch*, *supra* at 219; see also *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 532; 620 NW2d 840 (2001).

Based on the preceding case law, we believe that in applying the general rule, *and absent any other factors*, Titan would be entitled to rescind the policy ab initio if Towner made a material misrepresentation[4] regarding the status of his license at the time he applied for insurance. See *Lake States*, *supra* at 331-332. However, GMAC argues that (1) the general rule

[4] The trial court never reached the issue of whether the misrepresentation was material. It is also unclear whether the parties agreed that if the facts are as suggested, the misrepresentation would be material. MCL 500.2103(1)(b). This issue should also be addressed on remand.

is inapplicable because it is an innocent third party, and (2) Titan did not submit admissible evidence to support the factual basis for its motion.

We hold that GMAC is not an "innocent third party" because that classification has only been applied by this Court where the third party has been injured or killed by the vehicle. See *Auto-Owners Ins Co v Johnson*, 209 Mich App 61, 64; 530 NW2d 485 (1995) ("once an innocent third party is injured in an accident"); see also *Lake States*, *supra* at 331; *Farmers Ins Exch*, *supra* at 218; *Katinsky*, *supra* at 170-171; *Ohio Farmers*, *supra* at 364-365; *Darnell*, *supra* at 9; *Cunningham*, *supra* at 477; *United Security*, *supra* at 43; *State Farm*, *supra* at 570. The conclusion that GMAC was not an innocent third party is further supported by the fact that in the absence of a separate, standard loss payable clause between GMAC and Titan, GMAC, as a lienholder, was merely entitled to step into the shoes of Towner, and its right to receive any benefits under the policy was no greater than Towner's. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 383-384; 486 NW2d 600 (1992). "Accordingly, a breach of the conditions of the policy by the insured would prevent recovery by the lienholder." *Id*. at 383. Accord: *Citizens Ins Co v American Community Mut Ins Co*, 197 Mich App 707, 709; 495 NW2d 798 (1992).[5]

In light of the foregoing, we conclude that the trial court erred in applying *Lake States* to the present case where there was no injured, innocent third party involved. Under *Hammoud*, therefore, Titan had no duty to verify the representations made on Towner's application.[6]

Nevertheless, we cannot conclude that the present record was sufficient to allow the trial court to grant summary disposition. The lower court record reveals that neither party submitted the deposition of Towner, nor even cited to any pages of that deposition.[7] As a result, there is no evidence that Towner either knew, or did not know, that he had a default judgment entered against him, or that he was notified about the potential for a suspended license. Additionally, the "evidence" supporting the assertion that Towner's license had been suspended, was merely a print-out from some unidentifiable source purporting to reveal that fact. This information, however, was material to the trial court's decision, and to our review of that decision. And, although in the end the trial court's decision in favor of GMAC may have somewhat mooted the need for evidence on these facts, as noted above, the trial court was not acting under the correct legal principles. For these reasons, we must vacate the trial court's order and remand so that the

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[5] Because GMAC is not an innocent third party, it is irrelevant for purposes of this case whether the insurance coverage was for optional benefits. *Lake States*, *supra*.

[6] We disagree with GMAC's implication that "because the misrepresentation was not discovered until after the loss had occurred," Titan was estopped from rescinding the policy. To the contrary, this Court has explicitly stated that it will "not interfere with defendant's right to rescind the policy ab initio had it chosen to do so upon discovery of the material misrepresentation, regardless of whether that discovery occurred before or after the loss." *Burton v Wolverine Mut Ins Co*, 213 Mich App 514, 518; 540 NW2d 480 (1995).

[7] Indeed, the cross-motions were filed before Towner's deposition. Titan filed a short supplemental brief that was dictated immediately after Towner's deposition, which contained no cite to the transcript.

parties may have the opportunity to submit substantively admissible evidence on these material facts, *Quinto, supra*, and the trial court can analyze these facts under the principles outlined in this opinion.[8]

On remand, the evidence may well establish, as suggested by Titan, that Towner testified that he did not yet know that his license had been suspended at the time he completed the application, and that the Secretary of State had in fact suspended Towner's license before he applied for the insurance. As the parties acknowledge, this alleged lack of knowledge raises the issue whether the insurance policy was rescindable for an innocent misrepresentation. What the material facts are will determine whether the rule set forth in *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995), and other cases apply to the instant case. See, also, *Lake States, supra* at 331 ("[r]escission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer."), and *Old Line Life Ins Co of America v Garcia*, 309 F Supp 2d 966, 970 (ED Mich, 2004) ("rescission is available whether the insured's misrepresentation is intentional or innocent but, if it is innocent, the insurer must have relied upon the misrepresentation when entering into the contract."). The trial court will have to determine this issue in the first instance.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[8] We realize that Titan may assert that these material facts were as they suggested, so remanding is of little use. However, the summary disposition procedure is a key component in pretrial procedure, and needs to be adhered to in deciding such motions. Additionally, in GMAC's rather cursory response to Titan's motion, it asserted that Titan had only come forward with hearsay documents in support of its position.